



**BILLING CODE: 4410-09-P**

**DEPARTMENT OF JUSTICE  
DRUG ENFORCEMENT ADMINISTRATION**

**Docket No. 16-31  
PHONG TRAN, M.D.  
DECISION AND ORDER**

On June 29, 2016, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause to Phong Tran, M.D. (hereinafter, Respondent), the holder of 19 Certificates of Registration.<sup>1</sup> Order to Show Cause, at 1-3. Citing 21 U.S.C. 823(f) and 824(a)(3), the Show Cause Order proposed the revocation of Respondent's 19 Certificates of Registration on the ground that Respondent does not have authority to dispense controlled substances in the State of California, the State in which he is registered. *Id.* at 4.

As the jurisdictional basis for the proceeding, the Show Cause Order alleged that each of Respondent's 19 Certificates of Registration "are current and unexpired." Order to Show Cause, at 4. Respondent's registrations authorize him to dispense controlled substances in Schedules II through V. Government's Motion for Summary Disposition, Attachment 1, at 5-23.

As the substantive grounds for the proceeding, the Show Cause Order alleged that on or about December 9, 2015, Respondent was criminally charged in the County of San Diego

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<sup>1</sup> The 19 Certificates of Registration referenced in the Order to Show Cause are: FT4325242 in Vista, California (expiration date: November 30, 2016); FT4123422 in Garden Grove, California (expiration date: November 30, 2016); FT4086888 in Chula Vista, California (expiration date: November 30, 2016); FT4086876 in Escondido, California (expiration date: November 30, 2016); FT4086698 in San Diego, California (expiration date: November 30, 2016); FT4086686 in San Bernardino, California (expiration date: November 30, 2016); FP4086864 in Long Beach, California (expiration date: November 30, 2016); FT4046707 in Van Nuys, California (expiration date: November 30, 2018); FT3965540 in Anaheim, California (expiration date: November 30, 2018); FT4046543 in Temecula, California (expiration date: November 30, 2018); BT3239945 in Westminster, California (expiration date: November 30, 2018); FT4083111 in Downey, California (expiration date: November 30, 2016); FT4932097 in Rialto, California (expiration date: November 30, 2017); FT4946957 in Indio, California (expiration date: November 30, 2017); FT4946971 in Palmdale, California (expiration date: November 30, 2017); FT4963117 in Pasadena, California (expiration date: November 30, 2017); FT4963129 in Pomona, California (expiration date: November 30, 2017); FT4963131 in Hemet, California (expiration date: November 30, 2017); and FT3933593 in San Bernardino, California (expiration date: November 30, 2018). Order to Show Cause, at 1-3.

Superior Court (hereinafter, Superior Court) with 45 counts related to unlawful billing under the California Workers' Compensation System and that the charges were pending resolution. *Id.* at 4. The Show Cause Order further alleged that, in response to the criminal charges, the Medical Board of California (hereinafter, MBC) petitioned the Superior Court for an order suspending Respondent's medical license during the pendency of the criminal proceedings. *Id.* The Show Cause Order alleged that, on May 13, 2016, the Superior Court issued an Order granting the MBC's petition "and thereby ... indefinitely suspended ... [Respondent's] California medical license effective June 3, 2016." *Id.* The Order to Show Cause alleged that Respondent's medical license remained suspended and, "therefore, DEA must revoke ... [Respondent's] DEA ... [registrations] based upon ... [his] lack of authority to handle controlled substances in the State of California." *Id.* (citing 21 U.S.C. 802(21), 823(f)(1), and 824(a)(3)).

The Show Cause Order notified Respondent of his right to request a hearing on the allegations or to submit a written statement while waiving his right to a hearing, the procedure for electing either option, and the consequences for failing to elect either option. *Id.* at 4-5 (citing 21 CFR 1301.43). It also notified Respondent of his right to submit a corrective action plan. *Id.* at 5 (citing 21 U.S.C. 824(c)(2)(C)).

By letter dated August 25, 2016, Respondent requested a hearing stating that "Dr. Tran's medical license is still active and valid, and not suspended as alleged." Hearing Request (August 25, 2016), at 1.

On August 29, 2016, Chief Administrative Law Judge John J. Mulrooney, II (hereinafter, CALJ) issued an order setting September 9, 2016 as the date for the Government to submit evidence supporting the lack of state authority allegation and for any party's motion for summary

disposition to be due. Order Directing the Filing of Proof of Service, Evidence of Lack of State Authority Allegation, and Briefing Schedule, at 2.<sup>2</sup>

On September 9, 2016, the Government filed its proof of service evidence and Motion for Summary Disposition. Government's Proof of Service Evidence and Motion for Summary Disposition (hereinafter, Government's Motion). The Government's Motion argued that Respondent was "without state authorization to handle controlled substances in California, and as [sic] result, is not entitled to maintain his DEA Certificates of Registration." *Id.* at 1.

As support for its Motion, the Government provided a sworn Certification by the Chief of DEA's Registration and Program Support Section concerning each of Respondent's DEA registrations in California. Government's Motion, at Attachment 1 (Certification of Registration History dated June 29, 2016). The Certification attached a copy of each of Respondent's DEA registrations. *Id.* at 5-23. The Government also provided the MBC's Notice "to recommend that the [Superior] Court issue an Order prohibiting ... Phong Hung Tran, M.D. ... from practicing or attempting to practice medicine as a physician in the State of California, as a condition of any bail or own recognizance release, during the pendency of ... criminal proceedings."

Government's Motion, at Attachment 2 (Notice of PC23 Appearance and Recommendation at PC1275 Bail Hearing dated April 12, 2016) (hereinafter, MBC Notice), at 2. The Government's Motion also attached the MBC's brief in support of the MBC Notice. Government's Motion, at Attachment 3 (Memorandum in Support of Penal Code Section 23 Appearance and Recommendation to the Court dated April 12, 2016) (hereinafter, MBC Memorandum).

Attached to the Government's Motion were two Orders of the Superior Court. The first Order concerned Respondent's Condition of Bail Release and the second denied reconsideration

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<sup>2</sup> The Order also set the date and time for the Government to furnish proof of when it served the Order to Show Cause on Respondent. *Id.* at 1.

of the first Order. Government's Motion, Attachment 4 (Conditions of Bail Order dated May 13, 2016) (hereinafter, Conditions of Bail Order) and Government's Motion, Attachment 5, (Denial of Reconsideration of Conditions of Bail Order dated August 17, 2016). Also attached to the Government's Motion were a "Public Document List" and "Notification of Court Order" concerning Respondent's license from the California Department of Consumer Affairs. Government's Motion, Attachment 6. The September 8, 2016 Declaration of a DEA Diversion Investigator from the San Diego Field Division, also attached to the Government's Motion, described the status of Respondent's license as "indefinitely suspended" by the Superior Court. Government's Motion, Attachment 8 (Declaration of Drug Enforcement Administration Diversion Investigator, dated September 8, 2016) (hereinafter DI Declaration), at 2.<sup>3</sup>

As further support for the Government's Motion, the Government provided the Declaration of a California Deputy Attorney General who represented the MBC. Government's Motion, Attachment 9 (hereinafter, MBC Attorney Declaration).<sup>4</sup> The MBC Attorney Declaration's heading, "United States Department of Justice Drug Enforcement Administration," and docket number, "16-31," suggested that it was created specifically for this proceeding. *Id.* at 1.

The last attachment to the Government's Motion was Respondent's request for a hearing. Government's Motion, Attachment 10 (Hearing Request dated August 25, 2016). Attached to the Hearing Request was a two-page printout from the California Department of Consumer Affairs ("<https://www.breZE.ca.gov>") titled "License Details" and dated August 25, 2016 (hereinafter, BreEZe License Details). The printout showed Respondent's license status as

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<sup>3</sup> The seventh attachment to the Government's Motion was a Declaration of a DEA Diversion Investigator from the Los Angeles Field Division concerning service of the Show Cause Order on Respondent.

<sup>4</sup> The MBC Attorney Declaration referenced five attachments. None, however, was provided.

“License Renewed & Current” and secondary status as “Limits On Practice.” The document did not, however, state what limits were imposed on Respondent’s practice.

On September 27, 2016, Respondent filed his opposition to the Government’s Motion (hereinafter, Respondent’s Opposition). Attached to Respondent’s Opposition were the transcripts of two Superior Court hearings. Respondent’s Opposition, Exhibits 11 and 12 (Reporter’s Transcript of Proceedings for the April 8, 2016 and May 13, 2016 hearings) (hereinafter, April Transcript and May Transcript, respectively).<sup>5</sup>

Respondent stated that the MBC had not suspended his medical license. He asserted that, “The limitation on his practice arises from a Court Order issued by Judge Eyherabide on May 13, 2016, prohibiting respondent from practicing medicine during the pendency of his criminal matter as a condition of his bail.” Respondent’s Opposition, at 1.

By Order dated October 4, 2016, the CALJ denied the Government’s Motion. Order Denying the Government’s Motion for Summary Disposition (hereinafter, Order Denying Government’s Motion). The Order stated that “the ... [Superior Court] clearly imposed the prohibition on practice *as a condition of bail release* – not as a suspension or restriction on the Respondent’s professional license itself.” Order Denying Government’s Motion, at 5. The Order cited “[v]erification information available on the California Department of Consumer Affairs BreEZe website” as providing “further support for the proposition that the Superior Court’s proscription against practicing medicine did not change ... [Respondent’s] medical licensure status.” *Id.* at 5-6 (footnote omitted). The Order concluded that, “Respondent (albeit at the peril of his release conditions) maintains the state authority requisite to retain his DEA ... [registrations]” and “the Government has not met its burden to prove that the Respondent lacks

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<sup>5</sup> The cover sheet for the May Transcript mistakenly attributed its contents to the hearing on April 8, 2016. The first page of the May transcript, however, noted the actual May date of the transcribed proceedings.

state authority to handle controlled substances in California, the sole basis for its Motion.” *Id.* at 8. Thus, it denied the Government’s Motion for Summary Disposition noting that “the Respondent has (inexplicably) not filed a motion for summary disposition.” *Id.* at 8 n.20.<sup>6</sup>

On October 17, 2016, the CALJ conducted a status conference by telephone with the Government and counsel for Respondent. Order Granting Respondent’s Request for a Continuance, at 1. During the status conference, counsel for Respondent sought, and was granted with the consent of the Government, a continuance until the afternoon of October 20, 2016 to file a motion for summary disposition. *Id.* at 1.

By motion dated October 17, 2016, Respondent requested dismissal of the Order to Show Cause. Respondent’s Motion for Summary Disposition (hereinafter, Respondent’s Motion), at 1. Attached to the Respondent’s Motion were the April and May Superior Court hearing transcripts, an updated but substantively identical version of the BreEZe License Details, and “License Details – Public Record Actions – Court Order” from the California Department of Consumer Affairs concerning Respondent’s license (hereinafter, BreEZe License Details - Court Order). The “Description of Action” section of the BreEZe License Details - Court Order stated that the “Superior Court of California, County of San Diego, issued an Order .... Dr. Tran shall not practice medicine during the pendancy [sic] of this case beginning 06/03/16.”

In further support of his Motion, Respondent stated that, “The Superior Court of California’s Order of May 13, 2016 prohibited Respondent from practicing medicine *as a condition of bail release* pursuant to Penal Code § 1275, and not as a suspension or restriction on

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<sup>6</sup> The CALJ also granted leave to the Government, “to the extent it is inclined to do so,” to file and serve on Respondent a superseding Order to Show Cause no later than October 14, 2016 “to allow the Government to pursue administrative enforcement in *these proceedings*.” *Id.* at 8 n.21 (emphasis in original). By its filing dated October 14, 2016, the Government stated that it was not issuing a superseding Order to Show Cause concerning Respondent. Government’s Notice Regarding the Filing of Superseding Order to Show Cause, at 1.

his professional medical license.” Respondent’s Motion, at 1. Respondent’s Motion also stated that “Respondent’s professional medical license itself is currently active and is not restricted by the Court’s Order,” and alleged that his medical license “entitles him to handle controlled substances in California.” *Id.*

The Government opposed the Respondent’s Motion. Government’s Response to Respondent’s Motion dated October 27, 2016 (hereinafter, Government’s Opposition). In its Opposition, the Government admitted that “Respondent currently retains his state authority to practice medicine.” *Id.* at 2. Referencing the second prong of 21 U.S.C. 824(a)(3), the Government posited that “DEA is authorized to revoke a DEA ... [registration] even ‘... where suspension or revocation of a practitioner’s state license or registration has merely been recommended by state authority,’ and that DEA is not ‘... required to await a final decision from the State before acting to revoke’” a DEA registration. *Id.* at 2 (citing *Joseph Giacchino, M.D.*, 76 FR 71,374 (2011)); *see also id.* at 4.

The Government’s Opposition further stated that “the State of California (on behalf of the Board) not only sought to have the criminal court suspend Respondent’s medical license during pendency of criminal proceedings, but by the express wording of its April 12, 2016 court filing recommended that the court take this course of action.”<sup>7</sup> *Id.* at 6. The Government’s Opposition concluded that “[t]he Board’s recommendation of licensure suspension as a condition of bail clearly fits within the recommendation of ‘competent State authority’ wording of section 824(a)(3).” *Id.*

On November 7, 2016, the CALJ granted the Respondent’s Motion and recommended that the Government’s petition for revocation of Respondent’s certificates of registration be

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<sup>7</sup> The Government’s Opposition did not provide the page number on which this “express wording” appeared. I carefully reviewed the document the Government referenced multiple times and did not locate the “express wording.”

denied. Order Granting the Respondent's Motion for Summary Disposition (hereinafter, Order Granting Respondent's Motion), at 15. In the Order Granting Respondent's Motion, the CALJ, among other things, noted the Government's acknowledgement that Respondent had state authority to practice medicine, stated that the Order to Show Cause was insufficient to notice revocation of Respondent's registrations based on the second prong of 21 U.S.C. 824(a)(3), concluded that the "recommendation" in the second prong of 21 U.S.C. 824(a)(3) relates only to a practitioner's DEA registration, and determined that the MBC had not recommended a "suspension" of Respondent's registrations. *Id.* at 3, 10, 12-13, and 13, respectively.

On November 25, 2016, the Government filed Exceptions to the Order Granting Respondent's Motion. Government's Exceptions to Order Granting Summary Disposition Motion (hereinafter, Exceptions). In its Exceptions, the Government addressed whether the Order to Show Cause sufficiently noticed action against Respondent based on the second prong of 21 U.S.C. 824(a)(3),<sup>8</sup> whether a prerequisite to invocation of the second prong of 21 U.S.C. 824(a)(3) is a recommendation concerning a "DEA registration," and whether the California State Medical Board recommended that the Superior Court "suspend" Respondent's medical license. *Id.* at 1-9.

On December 2, 2016, the record was forwarded to my Office for Final Agency Action. Having considered the record and the Order Granting Respondent's Motion in light of all relevant statutory, regulatory, and case law authorities, I conclude that there is no basis for revoking Respondent's registration on the record before me.<sup>9</sup> Thus, I agree with the CALJ's

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<sup>8</sup> "... has had the suspension, revocation, or denial of his registration recommended by competent State authority ..."

<sup>9</sup> It is noted, however, that the issuance of a new Order to Show Cause would be appropriate if the MBC were to suspend or revoke Respondent's state license, or if Respondent's plea to, or conviction of, criminal charges resulted in mandatory exclusion under 42 U.S.C. § 1320a-7(a). Further, the issuance of a new Order to Show Cause based



ultimate conclusions that Respondent continues to have the State authority required for his registrations, and that the Government has not established the predicates under 21 U.S.C. §824(a)(3) to warrant revocation of Respondent's registrations.<sup>10</sup>

I make the following factual findings.

## **FINDINGS OF FACT**

### **Respondent's DEA Registrations**

The Order to Show Cause alleged that Respondent has held 19 registrations, all with addresses in California. Order to Show Cause, at 1-3. Based on the evidence submitted by the Government, I find that at least one of Respondent's registrations, FT3933593 in San Bernardino, California (expiration date November 30, 2018), is currently active. Government's Motion, at Attachment 1, at 10.

### **Indictment of Respondent**

On January 28, 2016, Respondent was criminally charged with 45 felony counts related to kickbacks, including 21 counts of workers' compensation fraud and 24 counts of insurance fraud. MBC Memorandum, at 2, 3; May Transcript, at 4-5, lines 23-2; DI Declaration, at 2. According to a State prosecutor, Respondent paid kickbacks for access to patients on a per patient basis. May Transcript, at 5, lines 12-28; at 6, lines 9-10; at 7, lines 24-26. At the May Superior Court hearing, the prosecutor represented that the individual to whom Respondent paid the kickbacks was a chiropractor working off Federal charges. *Id.* at 5, lines 12-20. One of Respondent's Physician's Assistants, the prosecutor further alleged, would see up to 100 patients

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on 21 U.S.C. § 824(a)(4) would be appropriate if properly supported by evidence, including evidence gleaned from the criminal proceedings against Respondent.

<sup>10</sup> This matter raises novel issues, and my analysis differs from the analysis in the Order Granting Respondent's Motion. Thus, I do not adopt the Order Granting Respondent's Motion.

a day, once a month, and provide the patients with prescription medications and compound creams. *Id.* at 6, lines 2-9. Respondent would bill the insurance companies for the visits and for the prescription medications and compound creams, according to the prosecutor. *Id.* at 6, lines 2-9, 16-25. The prosecutor explained that billing for compound creams was particularly lucrative because there was no limit on how much could be billed for a compound cream. *Id.* at 7, lines 1-20.

### **The Evidence Offered by the Parties in Support of their Respective Motions**

#### **The Superior Court Hearing in April, 2016**

On April 8, 2016, the Superior Court held a hearing at the request of the MBC. Attendees included State prosecutors and attorneys for the MBC and Respondent. According to its attorney, the MBC “provided notice to Respondent back in February that they will be appearing at the ... [California Penal Code] 23 to make a recommendation to provide information ..., *not to ask for suspension*, but to place a condition on ... [Respondent’s] bail O.R. release.”<sup>11</sup> April Transcript, at 30, lines 21-28 (emphasis added). A prosecutor explained that the California Attorney General decided, on behalf of the MBC, that “this is so important to public safety that they are literally putting their reputation on the line.” *Id.* at 23, lines 19-22. According to the prosecutor, “the Medical Board is basically here telling you look, we may have to go through a certain number of procedures to do this, but we are asking you, in the interim, tell

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<sup>11</sup> The MBC’s February Notice to Respondent was not put in the record of this proceeding.

California Penal Code 23 states, in pertinent part, “In any criminal proceeding against a person who has been issued a license to engage in a business or profession by a state agency pursuant to provisions of the Business and Professions Code ..., the state agency which issued the license may voluntarily appear to furnish pertinent information, make recommendations regarding specific conditions of probation, or provide any other assistance necessary to promote the interests of justice and protect the interests of the public, or may be ordered by the court to do so, if the crime charged is substantially related to the qualifications, functions, or duties of a licensee.”

“O.R. release” refers to a bail release on one’s own recognizance.

this individual not to practice medicine.”<sup>12</sup> *Id.* at 23, lines 22-26; *see also id.* at 30, lines 16-18 (Respondent’s counsel stating that “the Medical Board has never once independently tried to suspend ... [Respondent’s] license.”).

The Superior Court began the April 8, 2016 hearing by stating that “apparently there is a motion to continue.” *Id.* at 1, lines 22-23. One of Respondent’s attorneys acknowledged the motion “due to the unavailability of ... a witness allowed him to confront.” *Id.* at 1, lines 24-26. As the hearing proceeded, Respondent’s counsel argued that his client was entitled to due process because placing a no-medical-practice bail condition on Respondent’s medical license was tantamount to placing it under interim suspension. He stated that he brought a “motion” because “basically we are talking about an interim suspension, it’s another way of saying ... a restriction on someone’s license, and ... that ... requires that the evidence ... be shown through affidavit ... that the ... licensee [] have ... an effective right to confront those evidence.”<sup>13</sup> *Id.* at 4-5, lines 28-14.

The Superior Court stated that a co-defendant of Respondent had previously raised the issue of “whether or not this court should or has the power to actually suspend” a doctor’s medical license. *Id.* at 2, lines 7-8. The Court indicated the response it had given to the co-defendant:

I am not the Medical Board. I am not an attorney licensing board, I am not a real estate licensing board. The way I have framed this, frankly, is whether or not as a condition, ... if somebody has a fourth DUI, and is asking for their own recognizance, as a part of bail there are conditions, one, they can’t drive ... if they make bail or are released.

*Id.* at 2, lines 16-25. At the hearing, the Superior Court consistently indicated that “the real issue here [] is whether or not, as a condition of Dr. Tran’s O.R. release, ... he should be practicing

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<sup>12</sup> The prosecutor did not elaborate on what he meant by to do “this.”

<sup>13</sup> The motion Respondent’s counsel referenced was not put in the record of this proceeding.

medicine, not that I would be suspending a license. I don't have any power to suspend a license." *Id.* at 3, lines 4-8. Stating that "[t]here is no right to confront ... for the Court considering safety purposes," the Superior Court rejected the due process arguments of Respondent's counsel and invited them to appeal her ruling. *Id.* at 12, lines 2-4; *see also id.* at 7, lines 21-24; *id.* at 11, lines 24-25. Throughout the April hearing, the Superior Court continuously and consistently stated that she was not able to suspend a license, whether the license in question was a truck driver's license, a license to practice law, or a medical license. *Id.* at 3, lines 22-23; at 4, lines 22-23; at 6, lines 12-15; at 9, lines 7-8.

The Superior Court explained the extent of her authority with an analogy to a person put on probation. She stated, "as a condition of probation, the Court can impose, you can't practice accounting, you can't drive a truck, you can't practice medicine ... [and if] the person doesn't wish to accept it, they go to prison." *Id.* at 9, lines 10-14. She provided another example:

[E]ven if I was placing a person on probation, a lawyer, who committed fraud, I can't say and a condition of probation is I am taking away your license. I don't have a power to take away a license. The State Bar only has the power to take away a license. I can say as a condition of probation, you are not to practice law. He can still pay his Bar dues. It means when he's done with probation in two years, he's still a practicing attorney.

*Id.* at 9, lines 15-23. The Superior Court reiterated that she was not able to "yank" a person's license and "[w]hether it's as a condition of bail, or probation, it's a condition one can accept or not accept." *Id.* at 9, lines 24-26.

In the criminal case against Respondent, according to the Superior Court, she was able to place a no-medical-practice condition on Respondent's own recognizance release and she continued the hearing to May 13, 2016 for the purpose of determining whether to do so. *Id.* at 29, lines 8-25; *see also id.* at 10, lines 9-12.

Some statements at the April hearing suggested that the MBC had filed a pre-hearing statement recommending the suspension of Respondent's medical license. The Superior Court had stated, "Through the Attorney General's office, they<sup>14</sup> have requested, pursuant to Penal Code Section 23, to bring me the information ... and in the moving papers everybody talks about whether or not this Court should or has the power to actually suspend Dr. Tran's license." *Id.* at 2, lines 3-8; *see also id.* at 21, lines 21-27 (A prosecutor stating that "[c]ommonly these questions are initiated by a request by the Attorney General, a recommendation as it's termed, ... to take some action on a person's license. Just to be clear, ... we are not joining in the request that any action be taken on the defendant's license."); May Transcript, at 2, lines 11-14 (Superior Court noting that "[t]here are numerous briefs here from the People" and Respondent's counsel suggesting that, "That's probably from the prior set of P[enal] C[ode] 23 brief [sic].").

Other statements tended to oppose that possibility. April Transcript, at 19-20, lines 26-3 (Superior Court stating that, under Penal Code section 23, the State agency that issued a license to a criminal defendant may voluntarily appear to "furnish pertinent information, make recommendation [sic], regarding specific conditions of probation"); *id.* at 30, lines 21-28 (MBC provided notice to Respondent of its appearance "to make a recommendation to provide information ... not to ask for suspension, but to place a condition on his bail O.R. release.").

If there were any written submission by the MBC or a party in connection with the April Superior Court hearing recommending the suspension of Respondent's medical license or registration, it is not in the record before me.

Thus, based on the evidence in the April Transcript, I conclude that the Superior Court did not suspend or revoke Respondent's California medical license at the Superior Court April

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<sup>14</sup> The reference to "they" is not specified.

hearing, and that the suspension, revocation, or denial of Respondent's medical license or registration was not recommended by competent California State authority in connection with the Superior Court April hearing.

### **The Medical Board of California Notice and Memorandum**

In advance of the May Superior Court hearing, the MBC filed the MBC Notice and the MBC Memorandum. *Supra*. The MBC Notice stated, in pertinent part, that the MBC will appear before the Superior Court "to recommend that the Court issue an Order prohibiting ... [Respondent] from practicing or attempting to practice medicine as a physician in the State of California, as a condition of any bail or own recognizance release, during the pendency of ... [the] criminal proceedings." MBC Notice, at 2. The MBC Notice explained the grounds for its recommendation, stating that "if allowed to continue to practice medicine as a physician, ... [Respondent] poses a continuing danger to the public health, safety, and welfare." *Id.* It referenced the Superior Court's statutory authority to consider public protection when imposing bail and own recognizance release conditions. *Id.* The MBC Notice did not state that the MBC was recommending the suspension, revocation, or denial of Respondent's medical license or registration.

The MBC Memorandum made multiple points. First, it reiterated the MBC's recommendation to, and request of, the Superior Court that Respondent, "as a condition of any bail or own recognizance release, ... be prohibited from practicing medicine until resolution of the ... criminal proceedings." MBC Memorandum, at 2; *see also id.* at 4, 8.

Second, it stated that Respondent held a valid physician's license that "will expire on January 31, 2018, unless renewed." *Id.* at 2. The MBC Memorandum further explained that

Respondent's physician's license enabled Respondent "to provide medical services including issuing prescriptions for controlled substances to patients and conducting serious surgeries." *Id.*

Third, the MBC Memorandum stated that the MBC was responsible for enforcing the disciplinary and criminal provisions of the California Medical Practice Act, and that protecting the public was its highest priority in exercising its licensing, regulatory, and disciplinary functions. *Id.* at 3. It explained that it had the "power to suspend, revoke, or otherwise limit physicians and surgeons from practicing medicine for, among other things, unprofessional conduct and criminal convictions substantially related to the qualifications, functions, or duties of a physician and surgeon." *Id.*

Fourth, the MBC Memorandum cited California Penal Code § 23, *supra*, as authority for the MBC to appear in a criminal proceeding against a person to whom the MBC had issued a license to "furnish pertinent information, make recommendations regarding specific conditions of probation, or provide any other assistance necessary to promote the interests of justice and protect the interest of the public." *Id.* at 4. It also cited California law to support the reasonableness of a bail condition prohibiting Respondent from practicing medicine during the pendency of the criminal case.<sup>15</sup> MBC Memorandum, at 5-8.

Fifth, the MBC Memorandum stated that, "The felony charges in this case are extremely serious and are substantially related to the qualifications, functions, and duties of a physician and surgeon." *Id.* at 6; *see also id.* at 8. It stated that Respondent's alleged conduct "is not only unprofessional, but also dangerous, and evinces poor character, a lack of integrity and an inability or unwillingness to follow the law." *Id.*

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<sup>15</sup> The MBC Memorandum cited Penal Code § 1275 (the public safety is the primary consideration for judges in setting, reducing, or denying bail) and California Penal Code § 1318 (interpreted to require defendants released on their own recognizance to promise to obey all reasonable conditions related to public safety).

Nowhere in the MBC Notice or the MBC Memorandum did the MBC recommend the suspension, revocation, or denial of Respondent's medical license or registration.

### **The Superior Court Hearing in May, 2016**

On May 13, 2016, the Superior Court resumed the hearing it began in April. The May Transcript contained more information about the criminal charges against Respondent and the MBC's request of the Superior Court.

The prosecutor stated that Respondent was indicted for giving kickbacks for access to patients and filing fraud-based insurance claims based on those kickbacks. May Transcript, at 4-7, 11-12. The attorney representing the MBC stated that, "[i]n setting[,] reducing[,] and denying bail, ... [t]he public safety shall be the primary consideration." *Id.* at 13, lines 22-28. He argued:

When patients are sold for money, ... [Respondent is] going after patients, patients aren't coming after him, to seek medical help. He's seeking patients to make money. When patients are sold as commodities, does that pose a risk ... to the public? Patient care? And when their patient's safety is at risk, is that a risk of the public safety? Well of course it is, Your Honor.

*Id.* at 14, lines 6-12. The MBC attorney asserted that "[t]his was one of the largest insurance and worker's compensation fraud cases in the history of this county ..., a sophisticated large scale criminal enterprise." *Id.* at 14, lines 24-28. He summarized what the MBC sought from the Superior Court when he stated, "We ask the Court, as a condition of bail, to prohibit ... [Respondent] from practicing medicine during the pendency of this case." *Id.* at 15, lines 22-24.

The Superior Court ruled that "until the case is resolved, ... [Respondent] not be allowed to practice medicine. ... So that will be a condition of his continued bail." *Id.* at 20, lines 11-14. On August 17, 2016, the Court denied Respondent's request for reconsideration of this ruling. Government's Motion, Attachment 5, *supra*.



Thus, the Superior Court, at its May hearing, conditioned Respondent's own-recognizance bail release on his not practicing medicine. At the May hearing, the Superior Court did not suspend or revoke Respondent's California medical license, and no competent California State authority recommended the suspension, revocation, or denial of Respondent's medical license or registration.

### **The MBC Attorney Declaration**

The MBC Attorney Declaration contained five numbered paragraphs. The first paragraph stated that its declarant worked in the California Attorney General's Health Quality Enforcement Unit. MBC Attorney Declaration, at 1. Its second paragraph stated that Respondent was charged with 45 counts of felony crimes related to workers' compensation and insurance fraud. *Id.* Its third paragraph stated that, in April of 2016, the MBC attorney declarant "voluntarily appeared" on behalf of the MBC and recommended that the Superior Court issue an order, as a condition of bail, prohibiting Respondent from practicing medicine during the pendency of the criminal proceedings. *Id.* The fourth paragraph stated that the Superior Court, "as a condition of bail, ... issued an order prohibiting Dr. Tran from practicing medicine, effective June 3, 2016, during pendency of above criminal proceedings." *Id.* at 2. The last paragraph stated that the Superior Court denied Respondent's request for modification and/or removal of the bail condition. *Id.* While the MBC Attorney Declaration stated that it was sworn under penalty of perjury, neither the day of its execution in September, 2016 nor the signature on it was visible. For these reasons, I cannot give any credit to the MBC Attorney Declaration.<sup>16</sup>

### **The Status of Respondent's California Medical License**

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<sup>16</sup> Even if the date and signature on it were visible, the MBC Attorney Declaration contained no evidence tending to show that competent California State authority recommended the suspension, revocation, or denial of Respondent's medical license or registration.

According to the evidence in the record, Respondent and the Government eventually agreed that Respondent's California medical license was current.<sup>17</sup> Respondent's Motion, at 1 ("Respondent's professional medical license itself is currently active ...."); Government's Opposition, at 2 ("[T]his tribunal, as well as the Respondent in his pending summary disposition motion, have correctly pointed out that Respondent currently retains his state authority to practice medicine."); *see also id.* at 5. Thus, there ended up being no dispute that Respondent's California medical license was current. As of the date of this Decision and Order, Respondent's California medical license is current; it has not been suspended or revoked.<sup>18</sup>

### **DISCUSSION<sup>19</sup>**

Under Section 304 of the Controlled Substances Act (hereinafter, CSA), "[a] registration ... to ... dispense a controlled substance ... may be ... revoked by the Attorney General upon a finding that the registrant ... has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the ... dispensing of controlled substances ... or has had the suspension, revocation, or denial of his registration recommended by competent State authority ...." 21 U.S.C. § 824(a)(3).

Moreover, DEA has long held that the possession of authority to dispense controlled substances under the laws of the State in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a registration. This rule derives from the

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<sup>17</sup> California medical license number 74233.

<sup>18</sup> According to the website <https://www.breEZe.ca.gov>, Respondent's medical license has practice limits due to the Superior Court's imposition of an "own recognizance" bail condition.

<sup>19</sup> I need not address, and therefore decline to address, much of the content of the Recommended Decision, including most of the matters with which the Government took exception: whether the Government sufficiently noticed action against Respondent based on the second prong of 21 U.S.C. § 824(a)(3) and whether a prerequisite for invocation of the second prong of 21 U.S.C. § 824(a)(3) is a recommendation concerning a "DEA registration." I need not reach either of these matters because I find that the Government has not established that there was a suspension, revocation, or denial recommendation by competent State authority.

text of two provisions of the CSA. First, Congress defined “practitioner” to mean “a physician ... or other person licensed, registered, or otherwise permitted ... by the ... jurisdiction in which he practices ... to distribute, dispense, ... [or] administer ... a controlled substance in the course of professional practice ....” 21 U.S.C. § 802(21). Second, in setting the requirements for obtaining a practitioner’s registration, Congress directed that “[t]he Attorney General shall register practitioners ... if the applicant is authorized to dispense ... controlled substances under the laws of the State in which he practices.” 21 U.S.C. § 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, DEA has held repeatedly that revocation of a practitioner’s registration is the appropriate sanction whenever a practitioner is no longer authorized to dispense controlled substances under the laws of the State in which he practices medicine. *Frederick Marsh Blanton*, 43 FR 27,616 (1978) (“State authorization to dispense or otherwise handle controlled substances is a prerequisite to the issuance and maintenance of a Federal controlled substances registration.”). *See also James L. Hooper*, 76 FR 71,371 (2011) (collecting cases), *pet. for rev. denied*, 481 Fed. Appx. 826 (4th Cir. 2012).

### **Registrant’s California Medical License Has Not Been Suspended or Revoked**

In this case, the Government and Respondent eventually agreed that Respondent’s California medical license was neither suspended nor revoked. Respondent’s Motion, 1 (“Respondent’s professional medical license itself is currently active ....”); Government’s Opposition, 2 (“[T]his tribunal, as well as the Respondent in his pending summary disposition motion, have correctly pointed out that Respondent currently retains his state authority to practice medicine.”); *see also* Government’s Opposition, 5. Thus, there was no dispute between the parties concerning the status of Respondent’s California medical license. I, therefore,

conclude that the first prong of 21 U.S.C. § 824(a)(3) does not support revocation of any of Registrant's registrations.

### **Competent State Authority Suspension or Revocation Recommendation**

The Government's Opposition argues that revocation of Respondent's registrations is appropriate under the second prong of 21 U.S.C. § 824(a)(3). However, the Government cites no case interpreting that provision. Given the clear factual record before me, there is no need to opine on it, including on the requisite "recommendation" and whether "registration" refers to a State license/controlled substance registration or a DEA registration. In other words, the record simply contains no evidence that a "competent State authority" "recommended" the "suspension, revocation, or denial" of any "registration." *Supra*.

Having thoroughly examined all of the evidence in the record, including the evidence from the MBC, the Superior Court, and every attorney representing California, I found evidence only that the MBC recommended a no-medical-practice condition on Respondent's own recognizance bail release. While the record hints at the possibility that the MBC made a suspension or revocation recommendation, the record contains no evidence of such a recommendation.

The evidence in the record is clear that the Superior Court did not believe she had authority to suspend or revoke a license of any sort, let alone a DEA registration, and that she did not intend her orders to do so. The evidence in the record is equally clear that neither the Superior Court, the prosecutor, nor the MBC attorney recommended any suspension, revocation, or denial of any registration. Finally, the Government did not cite any decision holding that a no-medical-practice bail condition constitutes a recommendation of suspension, revocation, or denial.

In sum, viewing the evidence in the record in the light most favorable to the Government, the non-moving party, I find no evidence, let alone substantial evidence, that the factual predicates for applying either prong of 21 U.S.C. § 824(a)(3) have been established.<sup>20</sup> Thus, in this case, the record does not support revocation of Respondent's registrations under either the first or second prong of 21 U.S.C. § 824(a)(3).

### **ORDER**

Pursuant to the authority vested in me by 21 U.S.C. § 824(a)(3) and 28 CFR 0.100(b), I grant Respondent's Motion for Summary Disposition. I further order the dismissal of the Order to Show Cause. This order is effective [insert Date Thirty Days From the Date of Publication in the Federal Register.]

Date: June 24, 2017

Chuck Rosenberg

Acting Administrator

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<sup>20</sup> Although the Government cited 21 U.S.C. § 823(f) and 21 U.S.C. § 823(f)(1) in the Order to Show Cause, it did not squarely present, let alone develop, the theory that Respondent's registrations should be revoked based on 21 U.S.C. § 823(f)(1) in conjunction with 21 U.S.C. § 824(a)(4). Further, the cases the Government cited in the Order to Show Cause as providing "a summary of the legal basis for this action" did not rely on 21 U.S.C. §§ 824(a)(4) and 823(f)(1) as legal bases.

When invited by the CALJ to amend the Order to Show Cause, which included the possibility of developing a revocation theory under 21 U.S.C. § 824(a)(4) and 21 U.S.C. § 823(f)(1), the Government explicitly declined. Order Denying Government's Motion, at 8; Government's Notice Regarding the Filing of Superseding Order to Show Cause. As warranted with the passage of time and the garnering of relevant evidence, the Government is free to issue a new Order to Show Cause concerning Respondent's registrations based on appropriate legal authority. *Supra.*

